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The right to food

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the interim report of the Special Rapporteur on the right to food, Olivier De Schutter, submitted in accordance with paragraph 33 of Assembly resolution 62/164.

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Report of the Special Rapporteur on the right to food

Summary

The present interim report highlights some of the challenges currently facing the realization of the right to adequate food and presents the priorities of the mandate of the new Special Rapporteur on the right to food. The Special Rapporteur will seek to devote equal attention to the establishment of an international environment enabling States to develop strategies for the fulfilment of the right to food and to the development of such strategies at the domestic level. During the first year of his mandate, he intends to address the international dimension of the mandate by focusing on four issues: the future of food aid; the impact of trade in agricultural commodities on the right to food; the impact of the protection of intellectual property rights on agriculture; and the impact of the activities of the agribusiness sector on the right to food. He will explore those issues through his mission to the World Trade Organization and various consultations. As regards the national strategies States should put in place in order to respect, protect and fulfil the right to food, the Special Rapporteur will explore the institutional tools that could best contribute to this objective and will devote particular attention to human rights relating to the use of land and women's human rights.

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I. Introduction

1. The mandate of the Special Rapporteur on the right to food was established by the Commission on Human Rights in its resolution 2000/10. In September 2007, the Human Rights Council, in its resolution 6/2, reviewed and extended for three years the mandate of the Special Rapporteur, who has been requested to: (a) promote the full realization of the right to food and the adoption of measures at the national, regional and international levels for the realization of the right of everyone to adequate food and the fundamental right of everyone to be free from hunger so as to be able fully to develop and maintain their physical and mental capacities; (b) examine ways and means of overcoming existing and emerging obstacles to the realization of the right to food; (c) continue mainstreaming a gender perspective and taking into account an age dimension in the fulfilment of the mandate, considering that women and children are disproportionately affected by hunger, food insecurity and poverty; (d) submit proposals that could help the realization of Millennium Development Goal 1 to halve by 2015 the proportion of people who suffer from hunger, as well as to realize the right to food, in particular taking into account the role of international assistance and cooperation in reinforcing national actions to implement sustainable food security policies; (e) present recommendations on possible steps towards achieving progressively the full realization of the right to food, including steps to promote the conditions for everyone to be free from hunger and as soon as possible enjoy fully the right to food, taking into account lessons learned in the implementation of national plans to combat hunger; (f) work in close cooperation with all States, intergovernmental and non-governmental organizations, the Committee on Economic, Social and Cultural Rights and other relevant actors representing the broadest possible range of interests and experiences, within their respective mandates, to take fully into account the need to promote the effective realization of the right to food for all, including in the ongoing negotiations in different fields; and (g) continue participating in and contributing to relevant international conferences and events with the aim of promoting the realization of the right to food.

2. On 26 March 2008, the Human Rights Council appointed Olivier De Schutter (Belgium) as the Special Rapporteur on the right to food. Mr. De Schutter started his tenure on 1 May 2008, succeeding Jean Ziegler, who had held the mandate for more than six years. The new Special Rapporteur takes this opportunity to express his deep appreciation for the important work undertaken by Mr. Ziegler in promoting the right to food and developing the mandate.

3. The present interim report is the first submitted to the General Assembly by the new Special Rapporteur in accordance with General Assembly resolution 62/164 and Human Rights Council resolution 6/2. It offers an initial description of the framework within which the Special Rapporteur intends to fulfil his mandate and explains which priorities have been chosen and why.

4. In presenting the priorities of the mandate, the report focuses on the structural and long-term dimensions of the right to adequate food. It is not its objective to discuss the current situation of the right to food in the world. As is well known, the world has experienced during the past year a dramatic increase in food prices on international markets. During the first three months of 2008, international nominal prices of all major food commodities reached their highest levels in nearly 50 years, while prices in real terms were the highest in nearly 30 years, and social unrest

developed in more than 40 countries as a result. It is in the context of these soaring food prices that the Special Rapporteur was appointed. Immediately upon assuming his mandate, the Special Rapporteur presented a background note[1] on the factors behind the crisis and called upon the Human Rights Council to hold a special session on the global food crisis, which was held on 22 May 2008 (see A/HRC/S-7/2). The Council requested the Special Rapporteur to submit a report at its ninth session (8-26 September 2008; see resolution S-7/1 and A/HRC/9/23) on the responses provided by the international community to the global food crisis. In order to minimize duplication, these immediate developments, important as they are, are not addressed in the present report. Instead, the views of the Special Rapporteur on how the mandate should develop and which issues should be addressed are described. The Special Rapporteur would be particularly grateful to all stakeholders for any reactions to these proposals.

5. Under the terms of Human Rights Council resolution 6/2, the Special Rapporteur is encouraged to work in close cooperation with all stakeholders, including non-State actors, in the fulfilment of the mandate. Since the beginning of his mandate, the Special Rapporteur has had opportunities to improve his understanding of the expectations of the members of the Human Rights Council about the mandate, including exchanges with the Council at its seventh special session, devoted to the global food crisis. He also reported to the Council at its eighth session, held from 2 to 18 June 2008, about his participation in the High-level Conference on World Food Security, held in Rome from 3 to 5 June 2008, and to the Human Rights Council at its ninth session.

6. The Special Rapporteur also engaged in consultations with many other actors. Between 1 May and 1 August 2008, he met with high-level representatives of the World Bank and the World Trade Organization. He had exchanges not only with the Office of the United Nations High Commissioner for Human Rights, but also with the United Nations Development Programme (UNDP), the United Nations Children's Fund, the Office for the Coordination of Humanitarian Affairs, the secretariat of the United Nations System Chief Executives Board for Coordination, and the high-level Task Force on the Global Food Security Crisis. He also had contacts with the Food and Agriculture Organization of the United Nations (FAO) (including, but not limited to, its Right to Food Unit), the International Fund for Agricultural Development, the World Food Programme (WFP), and the Standing Committee on Nutrition, and launched consultations with the private sector, including the Alliance for a Green Revolution in Africa. He also held a number of consultations with non-governmental organizations and academic experts. The Special Rapporteur was impressed by the level of commitment of those actors to the realization of the right to food and by the high expectations they have for the mandate. He is grateful to all those with whom he has consulted and looks forward to deepening those consultations in the coming year.

II. Approach to the mandate

7. The Special Rapporteur believes that a crucial first step towards the realization of the right to adequate food is the achievement of the first Millennium Development Goal. The international community must focus on the needs of the

[1] See http://www2.ohchr.org/english/issues/food/index.htm.

900 million persons who are hungry.[2] While this may sound obvious, it contrasts both with the idea that the problem of hunger can be overcome simply by boosting the level of agricultural production and with the idea that this can be done by combating poverty in general. Raising agricultural production levels may be important in its own right, but it does not ensure that the poor, who cannot afford to acquire food, or smallhold farmers, who cannot always adequately afford the inputs needed to produce food or lack access to credit, water or adequate infrastructure, will benefit. Combating poverty is, of course, a hugely important objective in itself, but it does not ensure that the hungry will benefit proportionately. This is because hunger is not only a consequence, but also a cause of poverty.[3] Poverty is related to multiple deprivations, of which undernourishment is only one, so that addressing poverty in general, if it means first addressing its other dimensions, will not always directly or swiftly result in the reduction of undernourishment.

8. Therefore, we must constantly be aware of who is hungry. The majority of hungry people in the world live in rural areas. About half of them live in smallholder farming households. Roughly two tenths are landless. Perhaps one tenth are pastoralists, fisherfolk and forest users. The remaining two tenths are the urban poor.[4] We should target our efforts towards those groups. In addition, we should not prioritize the interests of one of these categories over the other (as when we speak about the need to lower the prices of food on domestic markets in order to meet the needs of the urban poor, although this will be detrimental to agricultural producers), but instead, we should recognize the need to develop a panoply of strategies that can meet their needs simultaneously. We need not one, but a number of policies combined, to meet the needs of the diverse groups of hungry people.

9. The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement (see E/C.12/1999/5, para. 6). It is not about being fed. It is about being guaranteed the right to feed oneself, which requires not only that food be available (that the ratio of production to the population be sufficient), but also that it be accessible — that each household either have the means to produce its own food or have sufficient purchasing power to buy the food it needs. The right to adequate food is recognized in specific instruments, such as the Convention on the Rights of the Child (articles 24, para. 2 (c), and 27, para. 3), the Convention on the Elimination of All Forms of Discrimination against Women (article 12, para. 2) and the Convention on the Rights of Persons with Disabilities (articles 25 (f) and 28, para. 1), but it is stated most explicitly, at a more general level, in article 25 of the Universal Declaration of Human Rights and in article 11 of the International Covenant on Economic, Social and Cultural Rights. The latter should be read taking into account the interpretation of the Committee on Economic, Social and Cultural Rights, both in its concluding observations on the reports submitted by the States parties to the Covenant and in general comment 12,

[2] In 2005, FAO estimated that 852 million people, mainly in the developing world, were chronically or acutely malnourished. The regions affected were Asia, particularly India (221 million) and China (142 million); sub-Saharan Africa had 204 million hungry and was the only region of the world where hunger was increasing. FAO estimates that the number of hungry people increased by about 50 million in 2007 as a result of high food prices.

[3] *The State of Food Insecurity in the World 2006* (Rome, FAO, 2006), p. 13.

[4] U.N. Millennium Project, *Halving Hunger: It Can Be Done: Summary Version* (New York, UNDP, 2005), pp. 4-6.

on the right to food. These prescriptions are further complemented by the *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*, adopted by the States member of the FAO Council in November 2004. The Guidelines are a set of recommendations States have adopted to assist in the implementation of the human right to adequate food. They offer practical guidance to States about how best to implement their obligation under international law to respect the right to adequate food and to ensure freedom from hunger.

10. As recognized both under these provisions and in customary international law, the right to food imposes on all States obligations not only towards the persons living on their national territory, but also towards the populations of other States. These two sets of obligations complement one another. The right to food can be fully realized only when both national and international obligations are complied with. National efforts will often continue to have a limited impact in combating malnutrition and food insecurity unless the international environment, including not only development assistance and cooperation but also trade and investment regimes or efforts to address climate change at a global level, facilitates and rewards those efforts. Conversely, efforts by the international community to contribute to the objectives will depend for their effectiveness on the establishment of institutional and legal frameworks at the national level and on policies that are effectively geared towards the realization of the right to food in the country concerned. This mutual dependency of international and national obligations regarding the right to food is well expressed in articles 22 and 23 of the International Covenant on Economic, Social and Cultural Rights in which a link is established between the difficulties encountered by States in implementing the Covenant and the advisability of international measures likely to contribute to such implementation, and international action that may be taken to achieve the rights enshrined in the Covenant are described.

III. An enabling international environment

A. International obligations of States

11. Article 11, paragraph 2, of the Covenant refers to the need to take into account the problems of both food-importing and food-exporting countries and imposes on States an obligation to ensure an equitable distribution of world food supplies in relation to need. This wording itself confirms that States have "international" obligations, reaching beyond the national territory, in addition to the obligations each State has to its own population. Indeed, under general public international law, States may not disregard the impact of activities under their jurisdiction on other States' territories.[5] Consistent with this requirement, the Committee on Economic, Social and Cultural Rights has noted that States parties to the Covenant should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required;

[5] See *Trail Smelter case (United States of America vs. Canada), United Nations Reports of International Arbitral Awards*, vol. III, p. 1905, and *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland vs. Albania), Judgement of 9 April 1949, I.C.J. Reports 1949*, p. 4 at p.18.

should ensure that the right to adequate food is given due attention in the international agreements they conclude; and should consider the development of further international legal instruments to that end (see E/C.12/1999/5, para. 36, E/CN.4/2005/47 and A/HRC/4/WG.2/2).[6] The Human Rights Council, in its resolution 7/14, considered that all States should make every effort to ensure that their international policies of a political and economic nature, including international trade agreements, do not have a negative impact on the right to food in other countries.

12. The reference in article 23 of the Covenant to the various forms of international action that may be taken to achieve the rights under the Covenant clearly implies that, in order to comply with their international obligations, States must not only abstain from taking measures that have a negative impact on the right to food in other countries, but they may also need to adopt positive measures in order to protect and fulfil the right to food abroad. As shown by the reference in article 23 to the conclusion of conventions, these international obligations may require not only unilateral action, but also international cooperation, such as the provision of public goods at the global level. Ultimately, the goal should be to establish a social and international order in which the rights and freedoms set out in the Universal Declaration of Human Rights can be fully realized — something to which, under the terms of article 28 of the Universal Declaration, everyone is entitled. In principle, for a State to fulfil its international obligations by providing international assistance and cooperation, including aid, the consent of the receiving State is necessary. This follows not only from the reference to "free consent" in article 11, paragraph 1, of the Covenant, but also from the principle of the exclusive competence of the State in regard to its own territory (see, e.g., the Charter of the United Nations, Article 2, para. 4).[7] The only exception to this principle is where the unwillingness of the State concerned to accept aid may result in a violation of the right to food of its own population sufficiently serious and widespread as to justify the imposition on the international community of a responsibility to protect.

13. There is another trap that should be avoided in clarifying the scope of the international obligations under article 11 of the Covenant. Call this the paradox of many hands: the greater the number of States that have contributed to creating a situation that leads to violations of the right to food, the more difficult it becomes to assign responsibility to each of the States concerned for the situation thus created. This paradox is especially visible where international cooperation leads to the establishment of international organizations to which certain decision-making powers are transferred but which are not considered to inherit the pre-existing human rights obligations of their States parties since they possess a separate legal personality with rights and obligations defined independently from those of States. At a minimum, States should carefully assess the impact on the right to food of any such agreements to ensure that they do not circumvent their obligations by giving an international organization power that it then exercises in a way that results in denial

[6] See also Margot E. Salomon, *Global Responsibility for Human Rights* (Oxford, Oxford University Press, 2007) and Margot E. Salomon, Arne Tostensen and Wouter Vandenhole (eds.), *Casting the Net Wider: Human Rights, Development and New Duty — Bearers* (Mortsel, Belgium, Intersentia, 2007).

[7] See also the *Island of Palmas case (the Netherlands vs. the United States of America)*, Awards of 4 April 1928, *United Nations Reports of International Arbitral Awards*, vol. II, pp. 829-871 at p. 838.

of the right to food, which, would have constituted a human rights violation if directly attributable to the State (see A/61/10, para. 90, article 28 of the draft articles on responsibility of international organizations). This is of course without prejudice to the obligations of the international organization itself which, remains bound under general rules of international law under its constitution or under any international agreement to which it is a party.[8]

14. The right to adequate food is not one which any State can fulfil in isolation. All States have a shared responsibility, grounded in international law, to ensure that the international environment in which States operate enables them to respect, protect and fulfil the right to food for the benefit of their own populations. During the first year of his mandate, the Special Rapporteur intends to assist States in understanding the scope of their responsibilities in this regard by focusing on four areas, which he considers particularly relevant in the current context.

B. Issues for further consideration

1. Food aid

15. During 2008/09, a number of instruments relating to food aid will be renegotiated. In addition, the responses to the soaring food prices have highlighted the difficulties of combining emergency responses with the need to promote developing country food markets and food security in food aid recipient countries. There is a consensus on the need to switch from aid in kind to aid through cash transfers allowing procurement from local or regional markets and on the importance of food aid being provided with a clear exit strategy in order to avoid dependency. At the same time, since international agencies such as WFP are not reliable buyers in many markets, their ability to contribute to market development remains limited; in certain cases, the importance of WFP on local markets is such that withdrawal would have an impact on large traders and on the ability of the export sector to further develop. In the procurement policies of such agencies as WFP, a balance must be struck between the need to support smallhold farmers and the costs entailed by the need to monitor a large number of limited-volume contracts (see WFP/EB.1/2006/5-C). These are some of the challenges facing the "purchase for progress" approach, which aims to optimize the impact of WFP local food purchases (which totalled $600 million in 2007). Other questions concern the need for a global food fund in order to ensure that needs can be met in times of emergency without further tightening the market; the management of bilateral food aid; and the follow-up to the Paris Declaration on Aid Effectiveness to the extent that it relates to food and insofar as official development assistance may contribute to the right to food. In order to inform his work on these issues, the Special Rapporteur will hold a consultation in Ottawa in November 2008 in collaboration with Rights and Democracy and the Canadian Foodgrains Bank. The focus of the consultation will be on the future of the Food Aid Convention and the implementation of guideline 15 of the FAO *Voluntary Guidelines* on the right to food. It is expected that conclusions will be presented in the report of the Special

[8] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, para. 37. For an elaboration in the context of the right to food, see Smita Narula, "The right to food: holding global actors accountable under international law", *Columbia Journal of Transnational Law*, vol. 44, 2006, p. 691.

Rapporteur to the Human Rights Council at its tenth session, to be held in March 2009.

2. Trade liberalization in agriculture and the right to food

16. In June 2008, the Special Rapporteur conducted a mission to the World Trade Organization. He wishes to thank in particular Pascal Lamy, the Director-General, and the World Trade Organization secretariat for their willingness to contribute to the mission, in which they fully cooperated. This mission was prepared in two expert meetings: one, held in cooperation with the University of Paris 1 Panthéon-Sorbonne, was held in Paris on 16 and 17 June 2008, and the second was convened with the non-governmental organization 3D — Trade, Human Rights, Equitable Economy, in Geneva on 19 June 2008, focusing on the question of intellectual property rights in the food system. The Special Rapporteur intends to engage in bilateral consultations with other stakeholders, in particular the ambassadors to the World Trade Organization, before finalizing his report to the Human Rights Council at its tenth session.

17. The mission to the World Trade Organization built on previous work done to explore the impact of trade liberalization, particularly through the Organization's agreements, on the right to food (see, e.g., E/CN.4/2002/54). Its aim was to examine the relationship between States' obligations to ensure the right to adequate food and the regime set up under the World Trade Organization agreements, in particular the Agreement on Agriculture, but also the Agreement on Trade-Related Aspects of Intellectual Property Rights and the General Agreement on Trade in Services. The purpose was not simply to superimpose distinct sets of commitments in order to identify potential incompatibilities, it was also, and more importantly, to examine whether the lowering of barriers to trade in agricultural products might limit the ability of the State concerned to protect the right to food, either because the livelihoods of its agricultural producers would be threatened (particularly for net food-importing countries) or because part of its population would not have the purchasing power required to buy adequate food in sufficient quantities, following the inflationary impact of the opening up of exports (for net food-exporting countries). At this early stage of his examination of the issues, the Special Rapporteur will limit himself to highlighting the questions which, in his view, deserve particular attention in his report and the methodological problems encountered.

18. A relatively small proportion, estimated at 15 per cent, of the food produced globally is traded internationally. The percentages are 6.5 for rice, 12 for corn, 18 for wheat and 35 for soybeans.[9] Nevertheless, the prices fixed on international markets have an important impact on the ability of farmers in the world to make a decent living, since, as a result of trade liberalization, there is a tendency for domestic and world prices to converge, for instance because imported goods compete with domestically produced goods on local markets. Historically those prices have been declining, particularly since 1979, since they correspond to marginal production costs, which are determined by the unit production costs of highly competitive large-scale agricultural producers in such countries as Argentina, Brazil, India and South Africa. In those countries unit costs are low because the

[9] M. Ataman Aksoy and John C. Beghin (eds.), *Global Agricultural Trade and Developing Countries* (Washington, D.C., the World Bank, 2005), pp. 177-179.

agro-ecological conditions are suitable for large-scale capital-intensive and land-extensive production, accentuated by considerable prior investments and contributed to by the fact that wages are lower than in developed countries pursuing a similar agricultural model. In the latter, less productive agricultural producers could compete internationally only by receiving heavy subsidies from the State, as in the European Union or the United States of America. In contrast, agriculture in regions where investments were insufficient or where farmers cannot be supported, such as in sub-Saharan Africa (where productivity per active labourer is a fraction of that in Europe or the United States), was severely damaged — and in certain cases destroyed — by such international competition. The question is whether trade liberalization in agricultural products, as such, is bound to lead to such failures owing to the considerable differences in productivity (and thus competitiveness) between producers from different regions or whether a multilateral trading system in agriculture can be imagined that allows the benefits of trade to be reaped without causing the disruptive effects seen in the past. Trade liberalization is not an end in itself. As confirmed by the preamble to the Marrakesh Agreement establishing the World Trade Organization and by the preamble to the Agreement on Agriculture, it is a means to achieve sustainable development and food security and to raise living standards.

19. The promise of trade liberalization is that by creating incentives for producers from different States to specialize in the products or services in which they have a comparative advantage, it will benefit all the trading partners, since it will lead to efficiency gains within each country and to increased overall levels of world production. Extensions of the classical "static" theory of comparative advantage suggest that economic growth and poverty alleviation may result. This assumes both that there exists in the States concerned a private sector both sufficiently robust and sufficiently flexible to act on price signals from the market and that economic growth will result in poverty alleviation through a "trickle-down" effect, although the automatic existence of such an effect remains contentious among economists. Concerning the right to food, however, what matters is not only whether more gets produced or traded or whether trade liberalization leads to economic growth. Rather, two other questions are central. First, the human rights perspective is concerned with who are the losers when countries specialize in commodities in which they have a comparative advantage as a result of the lowering of trade barriers and whether the losses can be avoided under alternative national and international policies. Whereas the economic argument for trade liberalization focuses on the long-term and aggregate (country-level) results, the human rights perspective focuses on the immediate consequences and the sectoral impact within each country. An approach based on the right to food, more specifically, should ensure that the situation of the hungry or the malnourished in the country concerned will improve as a result of the lowering of trade barriers. In this regard, note should be taken of the way in which the global supply chain has developed in the food sector. Whereas improved access to global markets can, for certain categories of farmers, constitute a powerful incentive to produce and to invest since it rewards any productivity gains they make, it can also shut out those who have insufficient capital to make the required investments and can increase their dependency on large, often foreign, food processors and retailers, with which they can hardly bargain on equal terms. The large-scale, agro-industrial producers that the global supply chain favours often produce crops for export through monoculture. The economies of scale reaped in such an approach are unavailable to marginalized smallhold producers, who face

obstacles to integration into global supply chains. In addition, the support given by industrialized countries to their agricultural producers combined with a lack of tariff protection on the side of developing countries has had a significant detrimental impact on developing countries' producers, particularly insofar as it resulted in import surges against which they were insufficiently protected.[10] Far from removing such distortions, the Agreement on Agriculture has to a large extent allowed them to continue, thus denying producers from developing countries the benefits of free and undistorted trade. It has also made it difficult for those producers to remain competitive in their own domestic markets, since the prices they could receive for their produce were insufficient and plunged many of them into debt, leading to rural exodus.

20. Second, a human rights perspective helps to identify the risks of countries being locked into the production of certain commodities in which they have established a comparative advantage. Comparative advantage is often constructed. It is not simply the result of natural endowments in productive factors, but is the result of specific public policies or of the order in which the respective trading partners have achieved economies of scale in particular lines of production. Although countries are constrained in what they may produce by natural factors, whether or not they are competitive in the production of agricultural commodities also depends heavily on political choices: how much is invested in rural infrastructure, in irrigation or in developing access to microcredit, or how much support is given to farmers to compensate for insufficiently remunerative prices. Reliance on comparative advantage should not be a pretext for impeding the climb of developing countries up the ladder of development, including in the agricultural sector, by moving towards the export of more value-added goods, for instance processed foods.[11]

21. Both of these considerations point in the same direction. International trade in agricultural products may produce great benefits for some, namely the most competitive, taking into account the public support they receive and the kind of environment in which they operate. But it will contribute to the realization of the right to food only if two conditions are fulfilled. First, Governments should have the policy flexibility both to protect their agricultural producers whose livelihoods may be threatened by import surges or repressed prices and to allow for a sufficient degree of diversity in various types of production. Second, smallhold farmers from developing countries — who constitute the majority of the hungry people on the planet — must not be marginalized as a result of the development of global supply chains, and they must be either better integrated in those chains (provided the means to reap the gains from the lowering of trade barriers) or allowed to prosper by relying on local and regional markets, which must be insulated from the damaging effects of global trade liberalization. More than any other sector of production,

[10] For general approaches, see FAO, report of the Committee on Commodity Problems, "Some trade policy issues relating to trends in agricultural imports in the context of food security" (CCP/03/10), and FAO Import Surge Project Working Paper No. 7: "Extent and impact of food import surges in developing countries: an analytical approach and research methodology for country case studies". For recent examples, based in part on the findings of FAO, see Armin Paasch (ed.), Frank Garbers and Thomas Hirsch, *Trade Policies and Hunger: the impact of Trade Liberalisation on the Right to Food of Rice Farming Communities in Ghana, Honduras and Indonesia* (Geneva, Ecumenical Advocacy Alliance, 2007).

[11] See Ha-Joon Chang, *Kicking away the Ladder: Development Strategy in Historical Perspective* (London, Anthem Press, 2002).

agriculture provides a source of livelihood as well as sustenance for the world's poor. It must therefore enjoy a special status in the world trading system.

22. Whether or not these conditions are realized depends not on the regime of the World Trade Organization agreements alone, but also on other international regimes and on the policies pursued at the national level. A major difficulty is that the impact of the World Trade Organization agreements cannot be considered in isolation from policy choices made elsewhere. The Special Rapporteur will pay particular attention not only to the questions of market access, domestic support and export subsidies under the Agreement on Agriculture, but also to safeguard clauses, such as the special safeguard clause open to developing countries having undergone tariffication[12] (article 5 of the Agreement on Agriculture) or the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (the "Marrakesh Decision"). The latter decision establishes response mechanisms to deal with the effects of liberalization of trade in agricultural commodities on the availability of "adequate" supplies of basic foodstuffs from external sources under reasonable terms and conditions. The report will examine whether the Marrakesh Decision allows States to protect the right of their populations to adequate food, particularly as a component of the right to an adequate standard of living of their smallhold agricultural producers. Consideration will also be given to the implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures in order to assess whether its implementation may create disproportionate obstacles to the access of agricultural producers from developing countries, particularly smallhold farmers, to the markets of industrialized countries and, if so, how such obstacles could be overcome, taking into account in this regard the important contribution of the Standards and Trade Development Facility launched in September 2002. Finally, the report will analyse the impact of the General Agreement on Trade in Services, particularly on small farmers in developing countries facing competition from global retailers on their domestic markets.

23. However, it is crucial to note that both the trade policies pursued by any State and its economic, social and taxation policies — on which much of the impact of international trade will depend — do not follow from the World Trade Organization agreements themselves, although they set a framework for the members. Rather, the policies result from the choices made by the Governments concerned in the light of domestic considerations or imposed on them as conditionalities by international financial institutions[13] or as part of trade agreements concluded at the bilateral or regional level; they depend on the budgetary means available to Governments to finance such policies, including for investments in agriculture and in rural infrastructure. The impact of the World Trade Organization framework can hardly be isolated from these other influences (or constraints) on governmental policies. The Special Rapporteur will seek to provide guidance to States about how they can maximize benefits from the existing framework and ensure that further steps towards trade liberalization do not have a negative impact on the right to adequate food, but instead contribute to its realization. Ultimately, upholding the right to

[12] Procedures relating to agricultural market-access provision in the Agreement on Agriculture under which all non-tariff measures are converted into tariffs.

[13] According to certain estimates, over 80 per cent of the tariff reductions consented to by developing States for agricultural products were the result of specific demands from international financial institutions.

adequate food is a responsibility of States, which are obliged under international law to take this right into account in the conclusion and implementation of trade agreements. The Special Rapporteur can contribute to this by highlighting the risks that accompany trade liberalization and by identifying possible solutions. But whether or not the right to food is observed will depend not on the World Trade Organization agreements alone, but on the combined result of those agreements and the domestic policies of the States concerned.

3. Intellectual property rights in the food system

24. The integration of intellectual property rights under the World Trade Organization framework deserves a separate comment (see also E/CN.4/Sub.2/2001/13). The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) requires World Trade Organization members to adopt wide-ranging minimum standards of intellectual property protection in a number of areas, including copyright, trademarks, patents and plant variety protection, all of which will have considerable implications across the food system. In particular, TRIPs requires that a minimum patent protection of 20 years be available for all inventions, whether of products or processes, in almost all fields of technology. Protection is optional for plants and animals (other than microorganisms), as well as for essentially biological processes used in the production of plants or animals (other than microbiological processes). However, World Trade Organization members must provide for the protection of plant varieties either by patents, by an effective sui generis system or by any combination thereof (article 27, para. 3 (b)).

25. In this context, a number of issues arise. The result of the strengthened protection of intellectual property rights at the global level, if it is indeed extended to plant varieties and seeds, would be to reinforce the control of corporations claiming such rights in the global food system[14] and to increase the price of inputs for farmers using protected plant varieties.[15] Extending patents to plant varieties in particular would accelerate the "verticalization" of the food production chain, as agricultural producers would become dependent on the prices set by companies for the seeds on which they have patents and would be denied the traditional right to sell and exchange seeds among themselves, as well as to save part of their crops in order to retain seeds for the next planting season — either as a consequence of the protection of patents[16] or by the use of "technology use agreements" by companies selling seeds. It would also lead to a decrease in biodiversity, since patents are granted on stable or fixed varieties, which, although they promise higher yields, encourage monocultural forms of agriculture.

26. Whether the sui generis option is a viable one remains an open question, since the precise content of this requirement is still contested. It has sometimes been argued that, in order to comply with this requirement, World Trade Organization members should adopt national legislation in conformity with the 1991 version of the International Convention for the Protection of New Varieties of Plants, the aim

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[14] These patent-holders are mostly from industrialized countries. UNDP, in its *Human Development Report 1999*, estimates that industrialized countries hold 97 per cent of all patents worldwide.

[15] Geoff Tansey and Tasmin Rajotte (eds.), *The Future Control of Food: a Guide to International Negotiations and Rules on Intellectual Property, Biodiversity and Food Security* (London, Earthscan, 2008).

[16] See, e.g., *Monsarto Canada Inc. v. Schmeiser* [2004] 1 S.C.R. 902.

of which is to grant and protect breeders' rights under a regime that ensures a significantly higher level of protection than previous versions of the Convention and makes the selling and exchanging of seeds of protected varieties illegal. At the other end of the spectrum, a number of countries, particularly from the African group within the World Trade Organization (even though many have not adopted a sui generis system in their domestic legislation), have taken the view that the TRIPs Agreement should be reconciled with the requirements of food security and thus with the well-established practices of saving, sharing and replanting seeds, and with the equally traditional practices of local farming communities to conserve and sustainably use biological diversity, including through the selection and breeding of plant varieties.[17]

27. A number of developing countries have been pressured to adopt national legislation that is in compliance with the 1991 version of the Convention, in particular as part of trade agreements they have concluded[18] or as a result of pressures brought to bear on them through the "technical assistance" provided to them. They have been discouraged from making use of the sui generis flexibility for the promotion of food security by facilitating access to genetic resources for agriculture, for instance through an "access and benefit-sharing" regime.[19] At the same time, initiatives have been developing to resist this trend. The Organization of African Unity (now the African Union) has developed an African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources,[20] which aims to achieve a balance between the protection of breeders and the preservation of local farmers' rights in the interest of the sustainable use of biodiversity. The International Treaty on Plant Genetic Resources for Food and Agriculture, with 119 States parties, was adopted by the FAO Conference in November 2001 and has been in force since 29 June 2004. It seeks to establish a multilateral system to facilitate access to plant genetic resources for food and agriculture and to share the benefits in a fair and equitable way. It is a promising and unique system of governance for global commons, aimed at ensuring food security, but it extends only to plant genetic resources for food and agriculture listed in annex I to the Treaty that are under the management and control of the States parties and in the public domain (article 11.2), although States are to take appropriate measures to encourage natural and legal persons within their jurisdiction who hold plant genetic resources for food and agriculture listed in annex I to include such resources for food and agriculture in the multilateral system (article 11.3). Despite its emphasis on free flows of germplasm ("open access"), the Treaty allows intellectual property rights on anything that is not "in the form received" (article 12.3), so that plant breeders' rights can be granted to plant varieties developed from genetic material obtained from the multilateral commons. It is therefore of limited usefulness in compensating for the privatization, through

[17] On these various positions, see World Trade Organization Council for Trade-Related Aspects of Intellectual Property Rights document IP/C/W/370/Rev.1.

[18] See http://www.grain.org/rights_files/TRIPS-plus-March-2008.pdf, and the free trade agreement between the United States of America and Chile, article 17.1, para. 3.

[19] See Philippe Cullet, "Intellectual property rights and food security in the South", *Journal of World Intellectual Property*, vol. 7, No. 3 (2004), p. 261; and *Integrating Intellectual Property Rights and Development Policy* (London, Commission on Intellectual Property Rights, 2002), chap. 3.

[20] http://www.africa-union.org/root/au/AUC/Departments/HRST/biosafety/AU_Biosafety_I.htm.

intellectual property protection, of genetic resources used in agriculture. In addition, the implementation by States of the provisions on farmers' rights remains uneven.

28. The International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to enjoy the benefits of scientific progress and its applications (article 15, para. 1 (b)). While the Covenant also guarantees the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, this human right benefits only natural persons and not legal persons. In addition, the Committee on Economic, Social and Cultural Rights, in its general comment 17, takes the view that the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration, and that ultimately, intellectual property is a social product and has a social function. States parties thus have a duty to prevent unreasonably high costs for access to plant seeds or other means of food production (E/C.12/GC/17, para. 35). Clearly, the privatization of genetic resources for agriculture resulting from the extension of intellectual property rights to plant varieties, plants or seeds may put this balance in jeopardy. The Special Rapporteur intends to study in depth this issue and others where intellectual property relates to other parts of the food system, in order to assist States in ensuring that the implementation of the TRIPs Agreement, and the protection of intellectual property rights on plant varieties in general, remain fully compatible with their obligation to protect the right to food, including the right of farmers to produce food under conditions that ensure an adequate standard of living. With this objective in mind, he will broaden his consultations beyond the World Trade Organization secretariat, academic experts and non-governmental organizations to the secretariat of the World Intellectual Property Organization and of the International Union for the Protection of New Varieties of Plant. Concrete recommendations will follow those consultations.

4. Impact of the activities of the agribusiness sector

29. A third field in which States may have responsibilities beyond their national borders to protect the right to adequate food concerns the regulation of transnational corporations in the food production and distribution chain. As requested by the Human Rights Council in its resolution 7/14, the Special Rapporteur intends to study this issue in close cooperation with the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. If adequate funding is available, he hopes to be able to convene a multi-stakeholder consultation to examine the contribution of the private sector to the realization of the right to food, distinguishing in this regard the role of the producers of inputs (seeds, fertilizers, pesticides), the role of food processors and the role of large retailers. On the basis of consultations and the research he has already commissioned, the Special Rapporteur will offer a diagnosis of the obstacles to the full realization of the right to food in the current organization of the food production and distribution chain. Taking as a departure point the framework proposed by the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (A/HRC/8/5), he will seek to identify the implications for both companies and States of the right to adequate food. He will also identify the best practices that are emerging, particularly as regards access to inputs and the inclusion of smallhold producers in the global supply chain, which contribute to the realization of the right to food. The

collaboration of business will be actively sought in order to achieve consensus on those issues.

IV. Domestic framework for the implementation of the right to food

30. At the country level, strategies should be put in place that ensure the progressive realization of the right to adequate food. States make an important contribution to the right to adequate food by supporting local agriculture, in particular by providing an adequate level of public investment in this sector, by building adequate infrastructure for transport and communication and by facilitating access to credit, to insurance mechanisms — particularly weather-indexed insurance schemes mitigating farmers' risks — and to inputs at an affordable price, particularly for smallhold producers. In this respect, the sudden increase in food prices on international markets represents an opportunity. The agricultural sector has been neglected for the past 25 years, despite the fact that agricultural growth is particularly powerful in reducing poverty.[21] The recent increase in prices may lead States to reinvest in agriculture, thus reversing this trend. But a national strategy aimed at realizing the right to adequate food goes beyond improving the level of agricultural production and beyond improving the situation of agricultural producers. Three dimensions of such a strategy deserve attention here.

A. Institutional component

31. A national strategy aimed at realizing the right to adequate food has, first, an institutional dimension. This is an essential complement both to the shaping of an enabling international environment and to national agricultural policies. Even if a State produces enough food to feed its entire population, has the capacity to export food or has the means to procure food from other States, the food that is available may still not be accessible to certain segments of the population. In general, this will be because those groups lack the necessary purchasing power to acquire the food that is produced or put on the market. This in turn may be because their needs are not well understood or are insufficiently taken into account in national policies because of discriminatory practices or because of a lack of control of private actors producing or distributing food. But whatever the reasons for the threat to their right to adequate food, the members of those groups must be adequately protected from such threats. This is a condition for food security, which is more than being fed.

32. It is not the purpose of the present introductory report to enter into the detail of such national strategies for the realization of the right to adequate food and to examine the methodological and institutional issues raised by the implementation of such strategies. The Special Rapporteur intends to examine these questions in the course of his country missions and in his discussions with the national institutions for the promotion and protection of human rights, with whom he intends to examine their potential contribution to such national strategies. It is expected that the Right to Food Unit of FAO will present, before the end of 2008, a guide on legislating for the right to food, providing a detailed outline of three levels at which States could

[21] See *World Development Report 2008: Agriculture for Development* (Washington, D.C., the World Bank, 2007), p. 6.

improve the regulatory framework of the right to adequate food (by constitutional provisions, by the adoption of a framework law and by ensuring a compatibility review of the most important pieces of regulation having an impact on the right to food). The publication of the guide should provide a unique opportunity to launch a discussion about how these prescriptions could be taken into account in a variety of national contexts.

B. Rights relating to the use of land

33. Security of land tenure presents a clear link to the human right to adequate food (see A/57/356, paras. 24 and 30). Half of those who are food-insecure live in smallhold farming households, and approximately 20 per cent are landless agricultural labourers: security of land tenure and access to land as a productive resource are essential for the protection of the right to food of both of these groups of people. Guideline 8, paragraph 10 of the FAO *Voluntary Guidelines* on the right to food emphasizes the need to promote and protect the security of land tenure, especially with respect to women and poor and disadvantaged segments of society, through legislation that protects the full and equal right to own land and other property, including the right to inherit; and it recommends advancing land reform to enhance access for the poor and for women. Building on this guideline, at the 2006 FAO International Conference on Agrarian Reform and Rural Development member States emphasized the essential role of agrarian reform in the realization of basic human rights and food security. They reaffirmed that wider, secure and sustainable access to land, water and other natural resources related to rural people's livelihoods, especially women and indigenous, marginalized and vulnerable groups, was essential to hunger and poverty eradication, contributed to sustainable development and should therefore be an inherent part of national policies. Indeed, rights related to the use of land also make economic sense: it has been widely documented that providing landowners or land users with security against eviction enhances their competitiveness by encouraging land-related investment, and lowers the cost of credit by increasing the use of land as collateral.[22]

34. As highlighted, for instance, in the work of the International Land Coalition,[23] the question of human rights related to the use of land is particularly topical for three reasons. First, the tendency towards trade liberalization in agriculture results in pressure to concentrate land in the hands of large agricultural producers who are better connected to the global markets and who can more easily meet the volume and standards requirements for export. This creates new threats to the security of land tenure for smallhold farmers. Indeed, trade liberalization in other sectors also may increase the demand for land. The relationship between local resource users and large industries is characterized by major imbalances of power. A number of cases have been documented where farmers have been expropriated for the building of industrial plants in conditions that amount to forced eviction with no or insufficient compensation.[24] For this reason, it is important not to focus exclusively on the economic case for securing rights related to land but to understand this as a

[22] Ibid., p. 139.

[23] See http://www.landcoalition.org.

[24] See, e.g., Malcolm Langford and Ujjaini Halim, "Expropriation and eviction: grassroots and human rights perspectives on compulsory acquisition", Global Land Tool Network Working Paper, September 2007.

human rights issue: while the strengthening of property rights is a condition for markets to transfer land to more productive uses and users, this should be encouraged only to the extent that it does not lead to further marginalization of the poorest, resulting for instance from distress sales of land by indebted farmers.

35. Second, the increased use of agrofuel may aggravate the insecurity of tenure. In a recent study,[25] the International Institute for Environment and Development and FAO note that, while the development of agrofuels may have positive effects under certain conditions, it also leads to competing resource claims between local resource users, Governments and incoming agrofuel producers, so that where appropriate conditions are not in place, the rapid spread of commercial agrofuel production may result — and is resulting — in poorer groups losing access to the land on which they depend. In such contexts the spread of commercial agrofuel crop cultivation can have major negative effects on local food security and on the economic, social and cultural dimensions of land use. The authors therefore call upon Governments to develop safeguards in procedures to allocate land to large-scale agrofuel feedstock production and not to abuse such concepts, as "under-utilized", "unproductive" and "degraded land" to avoid allocating land on which local user groups depend for their livelihoods.

36. Third, the recent increase in the price of primary agricultural commodities on international markets has led investors to buy land suitable for cultivation while speculating on further increases in the price of land in the future. This may result in poorer land users being priced out of land markets. It may also lead to the accelerated expansion of monocultures for the production of cash crops and to new risks resulting from the depletion of soils and the loss of biodiversity. Security of tenure constitutes an essential safeguard against these developments being unimpeded and further marginalizing the most vulnerable.

37. Noting that security of tenure is critical for the majority of the world's people, who depend on land and land-based resources for their lives and livelihoods, the former Special Rapporteur on adequate housing recommended that studies be conducted in this regard, building on the work of organized peasant and indigenous peoples' movements (A/HRC/4/18, para. 31). In close cooperation with other mandate-holders, particularly on housing and on the rights of indigenous peoples, the Special Rapporteur on the right to food will devote his attention to the question of rights related to the use of land as an essential condition for the realization of the right to adequate food. He also intends to place special emphasis on the protection of women's rights in this context. Landowners and land users should be protected from forced eviction, taking into account, in particular, the Basic Principles and Guidelines on Development-based Evictions and Displacement presented by the Special Rapporteur on adequate housing (A/HRC/4/18, annex I). States should also protect rights related to the use of land from interference by private parties. In certain circumstances, access to land should be facilitated, particularly for landless agricultural workers.

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[25] Lorenzo Cotula, Nat Dyer and Sonja Vermeulen, *Fuelling Exclusion? The Biofuels Boom and Poor People's Access to Land* (London, International Institute for Environment and Development, 2008).

C. Women's rights

38. The strengthening of women's rights is crucial for an effective national strategy for the realization of the right to adequate food. As noted by the International Assessment of Agricultural Knowledge, Science and Technology for Development, the proportion of women in agricultural production and post-harvest activities ranges from 20 to 70 per cent, and their involvement is increasing in many developing countries, particularly with the development of export-oriented irrigated farming, which is associated with a growing demand for female labour, including migrant workers. In addition, the majority of rural shop owners are women, and it is women, in general, who sell on the markets.

39. Article 13 of the Convention on the Elimination of All Forms of Discrimination against Women provides for the elimination of discrimination against women in economic and social life, particularly regarding the right to bank loans, mortgages and other forms of financial credit. Although there has been progress in ensuring equality between the sexes under the law, women continue to suffer from discrimination in a number of areas.[26] They do not benefit from equal access to economic resources, particularly land ownership. In a number of States, discriminatory family laws restrict the legal capacity of married women to administer or to inherit property. In certain cases, agrarian reform laws restrict the entitlement to women who are heads of household. Even when equal rights are fully recognized, women suffer de facto discrimination within the household in access to resources (for instance, women own only 2 per cent of all land), work opportunities or pay and access to health care, education, information and participation. In addition, women from certain groups may face multiple forms of discrimination. According to the International Assessment of Agricultural Knowledge, Science and Technology for Development, this discrimination may be perpetuated by current developments. The growing competition in agricultural markets increases the demand for flexible and cheap labour. Pressures mount on and conflicts develop over natural resources. In recent years, Governments have diminished their support for small-scale farms, and economic resources have been reallocated in favour of large agribusinesses. Others have documented the violations of women's rights in global supply chains.[27]

40. Here again, the human rights rationale is reinforced by an economic rationale. Because women play a key role in food and agriculture, growing, producing and selling food, they represent an opportunity for the implementation of the right to food and an untapped development potential: by improving their status and strengthening their access to economic resources, all of society may benefit. In addition, women often hold domestic responsibilities for food, childcare, water and firewood. Improving their education can make a tremendous difference in child nutrition if they know how to handle and preserve food and know what is healthy and safe for consumption.

41. The realization of the right to food requires that we prioritize women's access to education, science and technology and ownership and control of economic and natural resources. All discriminatory measures must be removed, for example to

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[26] See, *Women and the Right to Food: International Law and State Practice* (Rome, FAO, 2008).

[27] See Kate Raworth, *Trading Away Our Rights: Women Working in Global Supply Chains*, Oxfam Campaign Reports (Oxford, Oxfam, 2004).

facilitate access to land ownership and credit schemes. In addition, income-generating activities for women should be supported, and women's organizations and networks must be strengthened. The International Assessment of Agricultural Knowledge, Science and Technology for Development recommends that women's farmer groups be given explicit priority in value chains. It also lists other changes that may strengthen women's contributions to agricultural production and sustainability. The Special Rapporteur intends to build on these findings in his future work.

V. Conclusion

42. **The present preliminary report has highlighted some of the challenges currently facing the realization of the right to adequate food. With an estimated 900 million people suffering from hunger, ensuring the right to adequate food must be a top priority for all States and the international community as a whole. The Special Rapporteur is committed to working with all interested stakeholders towards developing sustainable solutions for eradicating hunger and implementing the right to food.**

43. **Future reports will identify specific recommendations arising from the work of the Special Rapporteur for the consideration of the General Assembly.**